CURRENT PROPOSALS FOR THE REFORM OF THE REGULATORY AGENCIES

Address of

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before the
Workshop Conference on
Securities Laws and Regulations
Atlanta, Georgia
August 18, 1960

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It is reported that at dinner one evening the wife of a well-known Hollywood director came up with the remark: "Darling, do you realize this is our anniversary?" to which her current soul mate replied, rather sullenly: "Please - not while I'm eating." Doubtless there are other topics of such weight that their discussion should be shunned at lunch time so as not to inhibit the digestive processes, and I would suppose that a talk on the subject of Current Proposals for the Reform of the Regulatory Agencies would conceivably fall within such a category. For this, I am sorry, and I promise to make my few comments as brief as possible.

The first of the Federal regulatory agencies, the Interstate Commerce Commission, was established in 1887, although the idea of regulation by administrative agencies had been developed in the proving grounds of state government over a period of thirty years or more before that. Since that time, Congress has repeatedly followed this early precedent, until there are now literally dozens of bodies in existence constituting what the journalists have taken to calling the "alphabet agencies." Whatever invidious terminology is applied to them, however, the fact is that the independent agencies have assumed a vastly important role in the economic life of our nation. In 1952, Mr. Justice Jackson stated that: "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."

The independent agencies in government take as many forms as there are problems presented, and it is this very elasticity of form which has induced Congress to establish first one and then another such institution. On the other hand, the independent regulatory agencies, which are those most in the public eye today, share one outstanding characteristic in that each of them exercises legislative, executive and judicial functions with reference to certain interstate business activities. There are six major agencies which are generally so classified, though there are other important agencies answering the same general description and there are activities of some executive departments which it is difficult to differentiate.

The regulatory agency as an institution has been under continual and severe attack, either directly or inferentially, during the past two or three years. True, it has seldom ever been entirely free from attack, but prior engagements have generally been confined to a variety of rather ineffective

sniping. To some degree, the present situation may be due to the maturity if not the senescence of the concept of regulation, which was last seriously reviewed in the 1930's when some of these agencies were established and the powers of others were radically extended. It has become fashionable, particularly among those inclined to look for brilliant and biting phraseology, to assert that these institutions in their old age are getting into bed with the industries they were established to regulate. It is, perhaps, to be expected that, with the accomplishment of the principal immediate aims of some of the so-called New Deal legislation, i.e., the reformation of certain existing economic disorders, the day-to-day operations of the regulated industries would conform themselves to the basic structure of the statutes, and that the activities of the agencies thereafter would tend to be more consistent with such industry activities.

This phenomenon is understandably displeasing to the crusading spirit, which tends to regard such an end result as constituting a surrender of the regulatory authority to the regulated. Actually, of course, it is nothing of the sort, being simply the reflection of the bow of the regulated industry to the inevitable.

The apparent development of the regulatory agencies beyond their ebullient youth has revived the critics of the administrative process. The good professors have led the hunt at full cry, and the sound of their chase was not long in reaching the sensitive ears of Congress. Soon thereafter, the professorial hunters were superseded by the professionals, with results with which you are all, I am sure, familiar.

I want today to restate some of the reactions of those who have been a part of the regulatory agencies to the problems which have been announced to have been uncovered by these studies. Some of these problems are very real and quite apparent, and ought to be seriously considered and solved by whatever means are appropriate. Others, however, seem to be highly synthetic and do not appear to justify the serious effects of the attempts to answer them.

A dispassionate analysis of the questions surrounding the regulatory process is not made any easier by the tactics of some of its critics. I refer, for a prime example, to the so-called Hector report, a document filed with the President by an agency member upon his retirement from office which was thereafter given rather wide publicity. An analysis of this report subsequently issued by his former colleagues demonstrates that the author, to put it charitably, was unduly selective in his facts. My own personal quarrel is with his logic. He elevates a recitation of alleged shortcomings within a particular agency into the basis for an attack upon the entire administrative

process, completely ignoring the rule of logic that the general does not always follow from the particular. I may say that Mr. Hector subsequently admitted the fallacy in this approach, though neither that admission nor the rather impressive answer of his agency was given any publicity at all, let alone enough to undo the harm which had been done.

At any rate, my own agency has appeared a number of times during the past couple of years before one committee or another of the House or Senate to answer questions, either generally or in connection with one or another of several pending bills as to various aspects of our activities. It is encouraging to report that these inquiries have seldom had any tinge of hostility, and have been most courteously and fairly conducted. Interestingly enough, they have generally been concerned not so much with substantive matters, such as the effect of regulation upon industry, as with procedural difficulties and questions of fairness and impartiality. In general, the Congress has shown little interest in the more radical proposals which have been advanced, such as the proposed segregation of functions. Apparently, Congress, at least, is satisfied with the concept of the administrative process as such, and is seeking not to destroy it or to remold it nearer to the professorial heart's desire, but to improve and expedite it, always within the framework of the traditional concepts.

To one who has spent a good many years in close contact with the regulatory process, this seems to be an entirely reasonable approach. The suggestions which have been advanced from time to time that it is necessary to reform the administrative agencies so as to fit them within the constitutional doctrine of segregation of powers seem essentially Procrustean in nature. They ignore all practical difficulties, which are legion, to say the least. One would think that such suggestions had long since been adequately answered, if not by long experience and the reasoned critiques of profound students of government, then at least by such trenchant whimsy as the late Mr. Justice Jackson delighted to turn upon them. You will recall for instance that, in a case involving the powers of the Federal Trade Commission, he noted that the administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking. Courts have differed in assigning a place to these seemingly necessary bodies in our constitutional system. Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

To a realistic mind, such as that of Mr. Justice Jackson, it is perfectly clear that these agencies are inevitable in our complex society, that their presence is entirely understandable and desirable from any pragmatic point of view and that the time and energy spent in attacks against their place in a philosophical political science could far more advantageously be spent in improving their techniques and strengthening their unique legal position. The rigid patterns of government which were workable and probably essential in the primitive frontier society must be modified from time to time to fit the vastly more sophisticated society of today. We cannot turn back our calendars merely because the admixture of powers which is a basic part of the administrative process does violence to the over-orderly legal mind.

The procedural problems which have been stressed in the hearings which I have mentioned and in which we have participated center, in large part, first upon the delays which seem to be an integral part of the administrative process and second, upon the confusion in which the ordinary practitioner welters when he is faced with a new set of rules of practice applicable to each agency with which he deals.

A large number of suggestions have been made regarding the prevalent delays within the agencies. There may be some question as to whether such delays are material in the sense that almost any problems involving legal technicalities are subject to some delay as, for example, procedures in the courts. Actually, the most fruitful source of what delay there may be has been the strange reluctance of Congress to cope with the fiscal facts of agency existence. Perhaps the most glaring example of this attitude has been the failure of Congress either to excuse the Federal Power Commission from the regulation of the producers of natural gas or to furnish them with funds necessary in order to perform such regulation. For another example, there have also been serious budgetary difficulties within our own agency which have contributed very materially to the situation in which we now find ourselves and where we simply can no longer promise unreservedly to conform our timetables to the demands of the underwriting industry. However, beyond all this, it is still true that a regulatory agency is a form of governmental bureaucracy and that the progress of many a proceeding through these intricate mazes is exasperatingly slow.

A problem of this nature is difficult to meet satisfactorily. As I have pointed out, some lack of expedition is inherent in any governmental action, particularly when it involves complex legal situations. The requirement that an agency pay more than lip service to the doctrine of stare decisis forces it to give meticulous and time-consuming attention to the

connotations of its actions. The flexibility which is the heart of the administrative process cannot be permitted to become arbitrary in nature, and the agency which does not observe a certain consistency with the past when it makes its decisions nor look to the future to ascertain their direct and indirect results is certain to find itself sooner or later in a completely indefensible position. Another complicating factor is the desire which is always present in the mind of the practical regulator to make perfectly sure that every person to be affected by a given determination is given full and free opportunity to plead his case. This often results in a record extending far beyond the calls of due process, and the problem is seldom made any simpler by the tendency of the lawyer to look upon almost any adversary proceeding as a game in which delay may result in some advantage to him.

Whether there is or can be any comprehensive or very concrete remedy for administrative delay is an extremely debatable question. There are some accelerated procedures which can doubtless be advantageously adopted, such as fuller use of the hearing examiner and pre-trial techniques, and it is incumbent on the agencies to use them if there is a possibility of a net gain. As Tom Meeker has told you, the SEC has recently adopted revised Rules of Practice which I commend to you for study if the occasion arises, the content of which was in substantial measure affected by a desire for expeditious handling of cases within the agency. We hope that these revisions constitute a constructive step in that direction, and it is our intention to continue studies of this nature in an attempt to solve what we can of these difficulties by changes in the individual agency rules.

The most effective expeditive measures, next to budgetary relief, are probably to be found in internal personnel control. No agency head likes to see his calendar far in arrears, if for no reason other than a pride of workmanship, and he naturally tends to shift his emphasis and personnel to meet emergencies as they may crop up. There are certain very definite administrative limitations to such action, however. It is not always easy and, indeed, it is not always possible to assign entirely new duties to specialists such as pervade our own staff. We can, and do take such matters into account in allocating new positions under our budget and in assigning priorities in recruitment. For the rest, I am afraid that we must do what we can with what is a none too elastic system of staff assignments.

The suggestions which have arisen out of these hearings that there be a uniform set of rules of practice applicable to all independent agencies have, to the lay mind, a very plausible sound. The fact is that these

recommendations do not have even the questionable virtue of novelty. One study after another over the years has seized upon this as a desirable concept, and one draftsman after another has tried and failed to come up with legislation which would accomplish this result and still avoid stultification of the work of one or more of the independent agencies. The end results sought to be achieved by these several institutions vary all over the lot, and the normal and natural means by which those aims may be reached are equally as diverse. Here, again, the reformer runs head on against practicalities. The best that anyone has been able to do along this line is the Administrative Procedure Act, and that skillfully drawn legislation was purposely left so vague that it must necessarily be supplemented by specific agency rules drawn to meet specific substantive statutory requirements. The common denominators between agencies which could be the subject of uniform rules of practice are relatively few and unimportant. A cease and desist order of the FTC is an entirely different animal from a broker-dealer revocation order of the SEC, has different aims, different results and is naturally and logically arrived at by different proceedings, and the questions raised in both of them differ essentially from the considerations involved in a financial order of the ICC, a rate order of the FPC or a certificate order of the FCC or CAB.

I have no doubt that it would be very helpful to the Bar if it could turn to a single statutory set of rules. However, the Federal Register, in which all agency rules are and must be published, now contains a complete and public compendium of these agency rules. It is true, of course, that the Federal Register is a notoriously unwieldy document and that it is often far easier to get a printed copy of the pertinent rules from the agency or from the Government Printing Office. The important fact for the practitioner to understand and keep in mind is that such rules do exist in practically every agency. As a matter of fact, the clamor, if there be any, though I myself have heard none, for uniformity may, with some degree of fairness, be attributed to nothing more weighty than the natural reluctance of the lawyer to do any more work than is absolutely necessary.

Some progress toward such uniformity as is possible in this situation has been achieved and further progress doubtless can be made through interagency cooperation rather than by statute. There has been a two-year study of this subject in the Committee on Uniform Rules of the President's Conference on Administrative Procedure. The illustrative rules which have been proposed by this Committee in certain areas, such as service of process, subpoenas, depositions, interrogatories and some others, constitute a presently untapped reservoir of proposals for agency consideration.

A renewal of this Conference has been suggested by Chief Judge Prettyman and is now pending. It seems to me that this approach offers a more likely solution of what problems there may be in this field.

The second general line of Congressional inquiry in these hearings, which is still to a large extent concerned with procedural techniques, has been as to the fairness and impartiality of agency proceedings. This is, of course, the area which has hit the headlines and with which the average citizen is most familiar. Here, I may say with some degree of self-congratulation, the SEC has had few brickbats thrown at it. This is not entirely our own doing, since the sphere of our activities, like those of some but entirely unlike those of other agencies, is almost entirely confined to police work. As I have pointed out before, we have little to pass out except trouble. We are not called upon to license anyone, we do not sit in judgment in such matters as rates, quality of service or working conditions, nor, except in very few instances, do we attempt in any way to evaluate or characterize the securities issued under our jurisdiction. In the course of this limited jurisdiction, we do not have very much difficulty in distinguishing between our adjudicatory and our rule-making functions, and we can, with relative ease, put on or doff the cloak of inaccessibility as the decencies in any particular matter may dictate. As I have intimated, we can and must be in close touch with the security markets and with those who engage in them, not only because we owe the industry a modicum of understanding, but also because a full understanding of the normal market processes is of immense help in our search for the questionable or unlawful processes. However, a decent respect for the good opinion of one's neighbor and a certain moral sensitiveness can mark out quite clearly the boundaries of legitimate interest.

As a general proposition and one which is far from original with me, I doubt that any legislation can be drafted which would insure that the administrators of the independent agencies will always arrive at completely impartial and impersonal decisions, any more than one can always be assured of a fair trial before a judge. Administrators and judges alike are human beings and subject to the frailties of humanity. In any event, it seems clear that legislation modifying the administrative process ought not to be based upon generalizations originating in what are conceived to be the faults of particular agencies, nor should the public, and least of all the professional observers, lose faith in the efficacy of these regulatory agencies because of isolated though highly publicized instances in which administrators may appear not to have exercised a degree of propriety consonant

with their responsibilities. On the other hand, administrators can hardly afford to adopt the position, paraphrasing Mr. Gilbert, that:

"The law is the true embodiment
Of everything that's excellent
It has no kind of fault or flaw,
And we, my Lords, embody the law."

By no means should the regulatory agencies be either sacrosanct or self-satisfied, and they can hardly object to a reexamination of existing administrative practices and procedures by any persons of good will. Nevertheless, it is no more than right that an analysis upon which a reorganization of important governmental institutions is to be based should be both accurate and dispassionate. The stakes are too high. The regulatory agency and the administrative process are integral parts of our fabric of government. They may have their weaknesses, and there is unquestionably room for improvement as, indeed, there is in most human institutions. A constructive approach to their problem is necessary, an approach which will strengthen the hand of the administrator and permit him to make and keep the independent agency a vital, effective force in government.